

December 2017

Abandoning the Stoppage of Work Inquiry: Why Other States Should Follow West Virginia's Lead on Labor Dispute Disqualification

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Recommended Citation

Will Lorensen, *Abandoning the Stoppage of Work Inquiry: Why Other States Should Follow West Virginia's Lead on Labor Dispute Disqualification*, 120 W. Va. L. Rev. (2017).

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ABANDONING THE STOPPAGE OF WORK INQUIRY: WHY OTHER STATES SHOULD FOLLOW WEST VIRGINIA'S LEAD ON LABOR DISPUTE DISQUALIFICATION

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I. INTRODUCTION

It is November 2011. Negotiations between Verizon Communications and two unions, representing field technicians and call center employees, reach an impasse.¹ Verizon, citing a declining industry, seeks health insurance and pension concessions from employees in the landline division.² The Communication Workers of America and International Brotherhood of Electrical Workers refuse.³ Across the nation, 45,000 workers walk out.⁴ Seventy percent of the employees at Verizon’s Clarksburg call center location participate in the strike.⁵ The dispute lasts for two weeks—the largest walkout in four years.⁶ Call volume at the Clarksburg location drops precipitously.⁷ The facility pivots its operational focus from customer service to customer retention during the labor dispute.⁸

For the duration of the labor dispute, the Verizon employees on strike collected unemployment benefits.⁹ The unemployment compensation statute permitted collection because the Verizon call center did not suffer a “stoppage of work” at the Clarksburg location.¹⁰ Indeed, under West Virginia’s unemployment compensation scheme, the availability of benefits for striking

¹ Steven Greenhouse, *Citing Stalemate, Verizon Workers Strike*, N.Y. TIMES (Aug. 6, 2011), <http://www.nytimes.com/2011/08/07/us/07verizon.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Verizon Servs. Corp. v. Bd. of Review of Workforce W. Va.*, No. 12-1106, 2013 WL 5967047, at *4 (W. Va. Nov. 8, 2013).

⁶ Steven Greenhouse, *Verizon Workers Plan to End Strike, Agreeing to Revive Talks Toward a Contract*, N.Y. TIMES (Aug. 20, 2011), <http://www.nytimes.com/2011/08/21/technology/verizon-workers-end-strike-though-without-new-contract.html>.

⁷ *Verizon Servs. Corp.*, 2013 WL 5967047, at *1.

⁸ *Id.* at *1, 6 (estimating a decline in call volume between 50% and 68.2%).

⁹ *Id.* at *4.

¹⁰ *Id.*

employees hinged on whether the employer suffered a “stoppage of work.”¹¹ That is, until April of 2017, when the West Virginia Legislature amended the statute.¹²

Most readers likely jumped to their own conclusion as to whether the Verizon employees should have been entitled to benefits—conversations about labor disputes and unemployment benefits will invariably strike a political nerve. Proponents of a more readily available system of unemployment benefits cite the moral concerns of providing for the needy.¹³ Economic concerns might also support expanding the benefits system; claimants tend to consume more, and expanding benefits could stimulate consumer industries.¹⁴

Critics of an expansive benefits system cite budgetary concerns and argue that tax burdens placed on employers hinder economic development.¹⁵ Critics also fear that a government-sponsored safety net discourages claimants from making difficult employment decisions.¹⁶ A laborer’s ability to freely make these decisions is an essential aspect of a free market economy¹⁷—readily available benefits might tip the scale.

Labor opinions are no less controversial. Pro-business camps rush to blame economic hardships on pro-labor stances,¹⁸ and vice versa. Policymakers have long struggled to strike the balance of power between laborers and employers. A balance that favors laborers too heavily could hinder industrial development; a balance that favors employers too heavily could facilitate unfair or oppressive working conditions.

This Note falls at the intersection between unemployment benefits and labor disputes by exploring a touchy question: under what circumstances are employees on strike entitled to unemployment benefits? There are real-world

¹¹ *Id.* at *4–5.

¹² See S.B. 222, 83d Leg., Reg. Sess. (W. Va. 2017).

¹³ See Paula Dwyer, *The Case for Extending Jobless Benefits*, BLOOMBERG VIEW (Dec. 27, 2013, 3:55 PM), <https://www.bloomberg.com/view/articles/2013-12-27/the-case-for-extending-jobless-benefits>.

¹⁴ Mohamed A. El-Erian, *Extending Unemployment Benefits Makes Good Economic Sense, Too*, HUFFPOST (last updated Mar. 7, 2014), http://www.huffingtonpost.com/mohamed-a-el-erian/extending-unemployment-benefits_b_4546245.html. Benefit recipients have a high marginal propensity to consume. *Id.*

¹⁵ Chris Edwards, *No Free Lunch in Subsidy Programs*, U.S. NEWS & WORLD REPORT (Dec. 9, 2011, 10:50 AM), <http://www.usnews.com/debate-club/should-congress-extend-federal-unemployment-benefits/no-free-lunch-in-subsidy-programs>. Chris Edwards of the CATO Institute argues that “[r]ather than stimulating anything, [budgetary deficits such as unemployment benefits] are destabilizing financial markets and damaging business confidence.” *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Meg Sullivan, *Hoover’s pro-labor stance helped cause great depression*, UCLA economist says, UCLA NEWSROOM (Aug. 28, 2009), <http://newsroom.ucla.edu/releases/pandering-to-labor-caused-great-91447>.

consequences. By wrongfully extending benefits to striking workers, employers fear that the state might provide fuel to a labor dispute.¹⁹ To add insult to injury, unemployment compensation is funded by a payroll tax levied on employers.²⁰ On the other hand, if benefits are wrongfully withheld, the humanitarian aims of unemployment compensation would be frustrated.

Even-handed claim resolution is essential for such a politically charged question. The Author will do his best to avoid result-based reasoning. Instead, he will argue for a clear, easy-to-apply approach. The “stoppage of work” inquiry—the majority view that ruled the day from 1936 until April 2017 in West Virginia—is not the answer. The new West Virginia statute, which removes the “stoppage of work” test, while preserving some of its features designed to protect certain claimants, offers a creative way forward. The new law is not perfect, but it can be clearly applied, and it offers employers and employees predictable outcomes. Other states should take note.

II. BACKGROUND

This Part will detail the state of labor dispute disqualification law. Section II.A will provide a broad overview of the history of unemployment compensation and the principles that underlie labor dispute disqualification. Section II.B will examine specific labor dispute disqualification statutes, including the recent change in West Virginia law.

A. Labor Dispute Disqualification, Generally

A general overview of unemployment compensation—and labor dispute disqualification—is necessary before diving into specific statutes. This Section will provide this overview by explaining the origins of unemployment compensation and then exploring the broad principles underlying labor dispute disqualification.

1. Historical Overview of Unemployment Compensation

State-levied unemployment compensation schemes first gained serious traction in the United States in the New Deal era.²¹ Proponents saw unemployment compensation as an insurance plan to help the state raise funds

¹⁹ See *Loc. Union No. 11 v. Gordon*, 71 N.E.2d 637, 642 (Ill. 1947) (hesitating to “attribute to the legislature an intent to finance strikes out of unemployment compensation funds”).

²⁰ *Social Security: Unemployment Insurance*, VCU LIBRARIES: SOC. WELFARE HISTORY PROJECT, <http://socialwelfare.library.vcu.edu/social-security/social-security-unemployment-insurance/> (last visited Sept. 20, 2017) [hereinafter *Unemployment Insurance*].

²¹ Edwin E. Witte, *An Historical Account of Unemployment Insurance in the Social Security Act*, 3 LAW & CONTEMP. PROBS. 157, 157–58 (1936).

during economic booms and disburse them in times of hardship.²² Stanley King, an early unemployment compensation theorist, articulated the policy concerns of the day:

The fundamental case for unemployment protection lies in the fact that under a democratic form of society we are forced to prevent any large scale starvation. Funds must be provided somehow It is practical sense to build a system which will gather the funds in good times and disburse them in bad times. This simple theory underlies all formal proposals for unemployment insurance, for unemployment reserves.²³

Through the early 1930s, however, the vast majority of unemployment compensation efforts died on the floors of state legislatures.²⁴ Only Wisconsin managed to pass a compensation program.²⁵ Contemporary economist Edwin Witte explained this failure of state-initiated programs, citing the concern of the “heavy burden on employers [within] the state which would handicap them in competition with employers from states not having such a law.”²⁶ Meanwhile, as state-led efforts failed, the national unemployment rate rose to 25% of the labor force.²⁷

In 1935, Congress stepped in and passed the Social Security Act, which incentivized states to implement compensation schemes by imposing a uniform federal payroll tax.²⁸ Congress granted employers a tax credit—up to 90% of the federal payroll tax—for the amount contributed to a state-run unemployment compensation program.²⁹ These funds are generally called “unemployment insurance” programs³⁰—West Virginia uses the moniker “Workforce West Virginia.”³¹ By 1937, each state had enacted an unemployment compensation

²² See generally *Unemployment Insurance*, *supra* note 20.

²³ Stanley King, *Unemployment Reserves and Insurance*, 23 AM. LAB. LEGIS. REV. 170, 170 (1933).

²⁴ Witte, *supra* note 21.

²⁵ Wisconsin Unemployment Compensation Act of 1932, ch. 20, 1932 WIS. SESS. LAWS 57, <https://docs.legis.wisconsin.gov/1931/related/acts/31ssact020.pdf>.

²⁶ Witte, *supra* note 21.

²⁷ Gene Smiley, *The Concise Encyclopedia of Economics: Great Depression*, LIBRARY OF ECON. & LIBERTY, <http://www.econlib.org/library/Enc/GreatDepression.html> (last visited Nov. 7, 2017).

²⁸ Witte, *supra* note 21.

²⁹ *Id.*

³⁰ See *id.*

³¹ *Unemployment*, WORKFORCE W. VA., <http://workforcwv.org/unemployment.html> (last visited Nov. 7, 2017).

program.³² Today, the vast majority of these schemes are funded by the payroll tax levied upon employers.³³

West Virginia's benefits program mirrors the schemes established in most other states. First, a claimant files a claim with the West Virginia Unemployment Compensation Division.³⁴ Next, the Division determines whether the claimant is eligible under section 21A-6-1 of the West Virginia Code.³⁵ If a claimant is deemed eligible, the Division must determine whether the claimant is disqualified under West Virginia's disqualification statute.³⁶ If not, the claimant collects.

The disqualification statute provides for several situations where a claimant cannot collect.³⁷ For example, a claimant who "voluntarily" leaves his or her job is disqualified for benefits unless that claimant can show "good cause" for departure;³⁸ courts, however, are generally hesitant to "weigh in" on the validity of a claimant's grievances about their prior employment.³⁹ A claimant who fails to accept suitable, available work is also disqualified.⁴⁰

2. Principles and Policy of Labor Dispute Disqualification

The focus of this Note is the "labor dispute disqualification": a claimant cannot collect benefits for time where the claimant was unemployed due to participating in a labor dispute.⁴¹ Several principles form the foundation for labor dispute disqualification.⁴² These principles do not control the outcome of individual claims, and courts and commentators do not agree as to their

³² *History of Unemployment Insurance in the United States*, U.S. DEP'T OF LABOR, <https://www.dol.gov/ocia/pdf/75th-anniversary-summary-final.pdf> (last visited Oct. 7, 2017).

³³ *State Unemployment Insurance Benefits*, U.S. DEP'T OF LABOR: EMP'T & TRAINING ADMIN., <http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp> (last visited Oct. 7, 2017).

³⁴ *Steps to File an Initial Claim and General Information*, WORKFORCE W. VA., <http://workforcewv.org/unemployment/claimants/filing-an-initial-claim.html> (last visited Nov. 7, 2017).

³⁵ See *Univ. of W. Va. Bd. of Trs. v. Aglinsky*, 522 S.E.2d 909, 911 (W. Va. 1999) ("The first step requires determining whether an individual is eligible to receive such benefits. The second step is to consider whether the individual is disqualified.").

³⁶ W. VA. CODE ANN. § 21A-6-3 (West 2017).

³⁷ *Id.* § 21A-6-3.

³⁸ *Id.* § 21A-6-3(1).

³⁹ See Thomas J. Goger, Annotation, *General Principles Pertaining to Statutory Disqualification for Unemployment Compensation Benefits Because of Strike or Labor Dispute*, 63 A.L.R.3d 88 (1975) [hereinafter *General Principles*] ("[E]ligibility of a particular claimant . . . would not be affected by the reasonableness or unreasonableness of the respective demands [underlying a labor dispute].").

⁴⁰ W. VA. CODE ANN. § 21A-6-3(3) (West 2017).

⁴¹ *Id.* § 21A-6-3(4).

⁴² *General Principles*, *supra* note 39.

application.⁴³ These principles should, however, color a legislature's approach in thoughtfully drafting a disqualification statute. They certainly *do* come into play when courts review disqualification schemes.⁴⁴

i. The "State Neutrality" Principle

An oft-cited principle in labor dispute qualification is that the state should remain neutral in employer-employee relations.⁴⁵ After all, the availability or unavailability of benefits can skew the power balance between the employer and the employee in collective bargaining negotiations.⁴⁶ Wrongfully withheld benefits stifle an employee's ability to hold out, while liberally available benefits might fuel disputes beyond the legislature's intent.⁴⁷ Courts attempt to remain neutral by refusing to weigh in on the merits of the underlying labor dispute.⁴⁸

Controversial claim resolutions can lead to charges that the state breached its duty of neutrality. The Supreme Court of Nebraska⁴⁹ faced such charges after *IBP, Inc. v. Aanenson*.⁵⁰ The court disqualified striking claimants for a six week period, while the labor dispute itself lasted for roughly 19 weeks.⁵¹ The court did not disqualify for the entirety of the labor dispute because the employer could have opened a secondary plant that would have alleviated the effects of the work stoppage.⁵² The court attributed the second half of the unemployment period not to the labor dispute, but to the employer's failure to

⁴³ *Id.*

⁴⁴ See *infra* text accompanying notes 195–202.

⁴⁵ See, e.g., *Robert S. Abbott Publ'g Co. v. Annunzio*, 112 N.E.2d 101, 106 (Ill. 1953); *Intertown Corp. v. Appeal Bd. of Mich. Unemployment Comp. Comm'n*, 43 N.W.2d 888, 890 (Mich. 1950).

⁴⁶ Pedro L. Cisneros, *Unemployment Compensation and the "Stoppage of Work" Concept – Abandoning State Neutrality by Requiring the Employer to Replace Strikers or Resume Operations During a Labor Dispute*: *IBP v. Aanenson*, 24 CREIGHTON L. REV. 685, 706–07 (1991).

⁴⁷ However, one commentator has suggested that a truly neutral state would never deny benefits to a participant in a labor dispute because of unequal bargaining power between employers and employees. Milton I. Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. CHI. L. REV. 294, 298 (1950).

⁴⁸ Cisneros, *supra* note 46, at 704–05.

⁴⁹ Nebraska's disqualification statute is identical to West Virginia's. Compare NEB. REV. STAT. ANN. § 48-638 (West 2017), with W. VA. CODE ANN. § 21A-6-3 (West 2017).

⁵⁰ 452 N.W.2d 59 (Neb. 1990); Cisneros, *supra* note 46, at 707–08.

⁵¹ *Aanenson*, 452 N.W.2d at 59.

⁵² *Id.* at 69.

mitigate.⁵³ Accordingly, the claimants collected benefits for those latter 12 weeks.⁵⁴

The *IBP* decision placed a burden on employers to either replace striking workers or resume normal operations within a “reasonable” amount of time—a burden not readily apparent in Nebraska’s unemployment statute.⁵⁵ One commentator argues that the court in *IBP* “abandoned the state policy of maintaining a neutral position in the labor dispute” by “[c]onsidering which party was responsible for the work stoppage” throughout the dispute.⁵⁶

The application of the state neutrality principle is highly contentious. Some commentators argue that any benefits available to striking employees would inherently render the state “un-neutral” because from the employer’s perspective, those benefits, in effect, fund the dispute.⁵⁷ These commentators argue that because unemployment compensation is not a natural right, but a creation of government, extending benefits during a labor dispute unnaturally places the state in the middle of labor negotiations.⁵⁸ A truly “neutral” state, then, would tend to favor disqualification, to permit each side to “naturally” exert its respective bargaining power.⁵⁹

Critics of this theory argue that blanket denial of benefits is equally “un-neutral” in favor of employers, as it discourages employees from utilizing their bargaining power.⁶⁰ Compensation is generally afforded to those who have voluntarily left employment for good cause or due to unsuitable working conditions.⁶¹ Workers engaged in a strike are voluntarily unemployed as a means to affect working conditions;⁶² a “neutral” state would stand by its policy of subsidizing voluntary unemployment for good cause.⁶³

Although commentators have questioned both the application and the importance of the state neutrality principle, courts will routinely implicitly or

⁵³ *Id.*

⁵⁴ *Id.* at 70.

⁵⁵ Cisneros, *supra* note 46, at 712.

⁵⁶ *Id.* at 707–08.

⁵⁷ *See, e.g.*, PAUL H. DOUGLAS, STANDARDS OF UNEMPLOYMENT INSURANCE 59–61 (1933).

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ Leonard Lesser, *Labor Disputes and Unemployment Compensation*, 55 YALE L. J. 167, 174–75 (1945).

⁶¹ *Id.* at 174.

⁶² *See* Shadur, *supra* note 47, at 299 (“Even to the extent that actual financing [of strikes] may sometimes take place . . . some strikes *deserve* to be financed as attempts . . . to protect positive rights given employees by other legislation or by contract.”).

⁶³ Lesser, *supra* note 60, at 174–75.

explicitly remind the parties that the state will remain neutral as to the merits of the underlying dispute.⁶⁴

ii. *The Humanitarian Aims of Compensation Schemes Should Be Considered when Interpreting Disqualification Statutes*

Courts also stress that unemployment compensation schemes should be liberally construed to achieve the statutes' purposes of promoting public health and general welfare.⁶⁵ Every unemployment compensation scheme has a legislative statement of purpose that claim these general interests. West Virginia's statement of purpose reads as follows:

[T]he legislature establishes a compulsory system of unemployment reserves in order to: (1) Provide a measure of security to the families of unemployed persons[;] (2) Guard against the menace to health, morals and welfare arising from unemployment[;] (3) Maintain as great purchasing power as possible, with a view to sustaining the economic system during periods of economic depression[;] (4) Stimulate stability of employment as a requisite of social and economic security[;] (5) Allay and prevent the debilitating consequences of poor relief assistance.⁶⁶

Courts cite the "humanitarian" aims of unemployment compensation to liberally construe unemployment compensation statutes.⁶⁷ Courts will also narrowly construe disqualification provisions to maximize the humanitarian legislative purpose.⁶⁸

However, weighing a legislature's dedication to welfare too heavily might fluster the legislative purpose behind enacting a disqualification statute—although states have enacted benefits programs with humanitarian goals, these states have also enacted disqualification statutes that deny access to these

⁶⁴ See Shadur, *supra* note 47, at 296–97.

[T]he rationale of state neutrality has been subjected to [a] dual attack: on its theoretical legitimacy and on its proper application to the problem of unemployment benefits. But once again, the attacks cannot obscure the fact that the rationale is present and must be dealt with in evaluating the acts and decisions under them.

Id. at 298.

⁶⁵ Davis v. Hix, 84 S.E.2d 404, 417 (W. Va. 1954).

⁶⁶ W. VA. CODE ANN. § 21A-1-1 (West 2017).

⁶⁷ Verizon Servs. Corp. v. Epling, 739 S.E.2d 290, 295 (W. Va. 2013).

⁶⁸ Herbert J. Thomas Mem'l Hosp. v. Bd. of Review of the W. Va. Bureau of Emp't Programs, 620 S.E.2d 169, 172 (W. Va. 2005).

humanitarian funds.⁶⁹ The Appellate Court of Indiana agreed that unemployment compensation schemes “should be liberally construed to give effect to its beneficent, humane and sound economic policy” but that “this liberality does not permit the giving of its benefits to those whom the legislature has positively determined should not have such benefits.”⁷⁰

iii. *Claimants Who “Voluntarily” Leave Employment
Should Not Be Entitled to Compensation*

Unemployment compensation is an insurance program designed to provide a measure of security for those who become involuntarily unemployed through no fault of their own.⁷¹ The system was not designed to compensate individuals who “willfully contribute[] to the cause of their own unemployment.”⁷² Although labor dispute disqualification statutes do not explicitly mention the “voluntariness” of a claimant’s unemployment, courts often take it into account.⁷³

The “voluntariness of unemployment” theory can be dangerous when applied to claimants involved in a labor dispute.⁷⁴ Judge Milton Shadur noted that “many courts have devoted more time to explaining why claimants’ unemployment was ‘voluntary’ so as to impose disqualification than to applying the actual terms of the labor-dispute provision itself.”⁷⁵ This Section will now turn to the actual terms of various labor dispute disqualification provisions.

B. *Labor Dispute Disqualification Statutes*

All states have a labor dispute disqualification statute.⁷⁶ This Section will look at similarities and differences in statutory language across the country. It will then give special attention to the story of labor dispute disqualification in West Virginia by looking at the old statute and the changes made by the state legislature in April of 2017.

⁶⁹ *Blakely v. Review Bd. of Ind. Emp’t Sec. Div.*, 90 N.E.2d 353, 356 (Ind. Ct. App. 1950).

⁷⁰ *Id.* at 357.

⁷¹ See *Childress v. Muzzle*, 663 S.E.2d 583, 587 (W. Va. 2008); Shadur, *supra* note 47, at 301.

⁷² *Hill v. Bd. of Review*, 276 S.E.2d 805, 807 (W. Va. 1981) (quoting *Bd. of Review v. Hix*, 29 S.E.2d 618, 619 (W. Va. 1944)).

⁷³ Shadur, *supra* note 47, at 296 (“[T]he doctrine that the right to benefits should be gauged by the ‘involuntary’ nature of unemployment must be recognized as the most influential theory in [mid-20th century] case law.”).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See Jerre S. Williams, *The Labor Dispute Disqualification – A Primer and Some Problems*, 8 VAND. L. REV. 338, 338–39 (1955).

1. The State of Labor Dispute Disqualification Across the Country

The Social Security Act of 1935 gave states a great incentive to quickly implement unemployment compensation schemes.⁷⁷ Two general approaches emerged: “labor dispute in active progress” disqualification, and “stoppage of work” disqualification.⁷⁸ This Section will look at each approach. But first, it will turn to the common provisions that can be found in many disqualification statutes across the country.

i. Common Provisions

Several default provisions are utilized across the country. One such default provision is an “escape clause.” This provision acknowledges that some claimants might find themselves unemployed after a labor dispute without ever participating in it.⁷⁹ The provision, then, permits labor dispute nonparticipants to “escape” disqualification. The Social Security Board’s Draft Bill of 1935 provides a nice example of an “escape clause”:

[A claimant is not disqualified] if it is shown to the satisfaction of the commissioner that—(1) He is not participating in, or financing, or directly interested in the labor dispute which caused the stoppage of work; and (2) He does not belong to a grade or class or workers of which, immediately before the commencement of the stoppage there were members employed at the premises at which the stoppage or occurs, any of whom are participating in or financing or directly interested in the dispute[.]⁸⁰

The United States Department of Labor explains that this provision is “so drafted as . . . to protect other workers from loss of benefits due to a strike that affects their work indirectly.”⁸¹

Another provision commonly found in labor dispute disqualification statutes is the “employer fault” provision. This provision immunizes claimants who, during a labor dispute, find themselves unemployed by “fault” of their employer.⁸² West Virginia’s old statute contains a nice example:

⁷⁷ Willard A. Lewis, *The Statutory Language of Labor Dispute Disqualification in State Employment Security Laws*, 82 POL. SCI. Q. 72, 74 (Mar. 1967).

⁷⁸ *Id.*

⁷⁹ *Id.* at 77.

⁸⁰ *Id.* at 75.

⁸¹ *Id.* at 80 (citing U.S. DEP’T OF LABOR, BUREAU OF EMP’T SEC., MANUAL OF STATE EMPLOYMENT SECURITY LEGISLATION 504–05 (1940)).

⁸² *Id.*

[Claimants are not disqualified if] the employees are required to accept wages, hours or conditions of employment substantially less favorable than those prevailing for similar work in the locality, or if employees are denied the right of collective bargaining under generally prevailing conditions, or if an employer shuts down his or her plant or operation or dismisses his or her employees in order to force wage reduction, changes in hours or working conditions.⁸³

An “employer fault” provision is a narrow departure from the state neutrality principle; a state will consider the merits of the dispute if the employer satisfies these criteria.⁸⁴ The most common example is in case of a lockout: a claimant who attempts to work but is turned away by his or her employer is not disqualified from benefits.⁸⁵

ii. *The Main Divergence: “In Active Progress” vs. “Stoppage of Work”*

While many states share these default provisions, the main divergence in state schemes is the meat-and-bones of the disqualification test.⁸⁶ “In active progress” and “stoppage of work” statutes present different inquiries that naturally lead to different results. This Section will examine each brand of statute, explain West Virginia’s old law, and review the changes the legislature made in 2017.

a. “In Active Progress”

Fifteen states and the District of Columbia have “in active progress” disqualification statutes.⁸⁷ Oregon’s law provides a clear example:

An individual is disqualified for benefits for any week with respect to which . . . the unemployment of the individual is due to a labor dispute that is in active progress at the factory, establishment or other premises at which the individual is or was last employed or at which the individual claims employment rights by union agreement or otherwise.⁸⁸

⁸³ W. VA. CODE ANN. § 21A-6-3(4) (West 2016) (amended 2017).

⁸⁴ Lewis, *supra* note 77, at 78.

⁸⁵ *Id.* at 84.

⁸⁶ *Id.* at 74.

⁸⁷ James K. Bradley & Daniel R. Schuckers, *Toward a Unified Theory of Unemployment Compensation Eligibility for Replaced Striking Employees*, 61 U. PITT. L. REV. 499, 505 (2000).

⁸⁸ OR. REV. STAT. ANN. § 657.200 (West 2017).

In an “in active progress” state, an unemployment compensation board—or a reviewing court—must determine: (1) whether a labor dispute occurred, (2) whether the labor dispute caused the claimant’s unemployment, and (3) whether the dispute was in active progress for the time in question.⁸⁹ If, say, a claimant remains unemployed after a labor dispute is resolved, that claimant is not disqualified for that post-dispute unemployment.⁹⁰ Of course, many “in active progress” states have “escape clauses”⁹¹ or “employer fault provisions”⁹² which add further nuance to this straightforward framework.

In 1940, the Federal Social Security Administration announced its disfavor of “in active progress” statutes.

The “dispute in active progress” concept . . . is so difficult of precise determination that it would seem to necessitate an arbitrary limit on the duration of the disqualification so that the agency would not be faced with the problem of determining whether a dispute is still “in active progress” several weeks or months after it begins. Such a limit has serious implications in the event of a prolonged strike involving a large number of workers. The “stoppage [of work] concept”, on the other hand, is more susceptible to determination by objective standards.⁹³

Sixteen jurisdictions use an “in active progress” statute.⁹⁴

b. “Stoppage of Work”

“Stoppage of work” statutes are highly litigated. First, this Section will introduce the “stoppage of work” issue. Next, this Section will survey how states differ on the scope of the inquiry, which can have far-reaching effects on respective outcomes. Finally, this Section will look more specifically at the workings of West Virginia’s old “stoppage of work” statute before the 2017 amendment.

⁸⁹ See Bradley & Schuckers, *supra* note 87, at 505.

⁹⁰ Foy Martin Sheet Metal v. Emp’t. Div., 713 P.2d 662, 664 (Or. Ct. App. 1986).

⁹¹ See Lewis, *supra* note 77, at 77.

⁹² *Id.* at 83–84.

⁹³ *Id.* at 81 (quoting U.S. DEP’T OF LABOR, BUREAU OF EMP’T SEC., MANUAL OF STATE EMPLOYMENT SECURITY LEGISLATION 505 (1940)).

⁹⁴ See Shadur, *supra* note 47, at 317.

A majority of states, including West Virginia up until the 2017 legislative session, followed the “stoppage of work” model.⁹⁵ These statutes borrow heavily from the Social Security Board Draft bill noted earlier.⁹⁶

An individual shall be disqualified for benefits . . . [f]or any week with respect to which the commissioner finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed[.]⁹⁷

Thus, a prerequisite to disqualification is that the employer suffered a “stoppage of work.”⁹⁸ If an employer cannot show that it suffered a “stoppage of work” in connection to the labor dispute, the inquiry ends there—the claimant can collect, regardless of the claimant’s participation in a strike.⁹⁹ Most states, including West Virginia under the old statute, define a “stoppage of work” as a “substantial curtailment” of the employer’s operations.¹⁰⁰ Administrative law judges will review evidence of a company’s operations before, during, and after the labor dispute to determine whether the employer’s operations suffered a “substantial curtailment.”¹⁰¹

The draft bill and many state laws¹⁰² require the employer to show a stoppage of work at the “factory, establishment, or other premises at which [the claimant] was last employed.”¹⁰³ Some courts read “establishment” broadly.¹⁰⁴ In these jurisdictions, the employer must show that company-wide operations suffered a work stoppage due to the strike in question.¹⁰⁵ Other courts find that an “establishment” is a distinct physical location. Employers in these

⁹⁵ See *infra* Sections II.B.2.b–d (discussing judicial approaches of states sharing West Virginia’s labor dispute disqualification language).

⁹⁶ SOC. SEC. BD., DRAFT BILLS FOR STATE UNEMPLOYMENT COMPENSATION OF POOLED FUNDS AND EMPLOYER RESERVE ACCOUNT TYPES 11–15 (1936) [hereinafter DRAFT BILLS].

⁹⁷ *Id.* at 13.

⁹⁸ See generally Thomas J. Goger, Annotation, *Construction of Phrase “Establishment” or “Factory, Establishment, or Other Premises” Within Unemployment Compensation Statute Rendering Employee Ineligible During Labor Dispute or Strike at Such Location*, 60 A.L.R.3d 11, § 3 (1974) [hereinafter *Construction of Unemployment Statutes*].

⁹⁹ See *Verizon Servs. Corp. v. Bd. of Review of Workforce W. Va.*, No. 12-1106, 2013 WL 5967047, at *5 (W. Va. Nov. 8, 2013) (permitting the dispersal of benefits where Verizon suffered no stoppage of work, even though claimants were undisputedly “on strike”).

¹⁰⁰ 76 AM. JUR. 2d *Unemployment Compensation* § 181.

¹⁰¹ See, e.g., *Verizon*, 2013 WL 5967047, at *5.

¹⁰² *Construction of Unemployment Statutes*, *supra* note 98, Part II § 3.

¹⁰³ DRAFT BILLS, *supra* note 96, at 13.

¹⁰⁴ See *Construction of Unemployment Statutes*, *supra* note 98, Part II § 4(a)–(b).

¹⁰⁵ *Id.*

jurisdictions need only show that a particular worksite suffered a stoppage of work.¹⁰⁶

Several states have adopted a factor-based inquiry to determine the scope of an “establishment” under their disqualification statutes.¹⁰⁷ This approach reads “establishment” to mean an “order or system” unrelated to physical location.¹⁰⁸ If a disqualification statute is read with this definition in mind, a claimant is only disqualified if an employer can show that a *unit of work* suffered a work stoppage.¹⁰⁹ The Supreme Court of Minnesota in *Nordling v. Ford Motor Co.*¹¹⁰ explained:

We believe that the solution of the problem lies in determining from *all the facts available* whether the unit under consideration is a separate establishment from the standpoint of employment and not whether it is a single enterprise from the standpoint of management or for the more efficient production of goods.¹¹¹

Factor-test states generally agree on which factors should be utilized, although there is some variance in application of those factors.¹¹² The Appellate Court of Indiana has summarized those factors:

Factors to be taken into consideration may include the functional integration of the corporation’s plants, the general unity of the plants as a whole, [] the physical proximity of one plant to other plants, . . . the hiring and firing of employees, the relationships between local unions and national unions, and the local agreements, including wages, seniority rights, etc.¹¹³

“Functional integration” and “general unity” lie at the heart of the term “establishment” for courts following this approach. In *Ford Motor Co. v. Abercrombie*,¹¹⁴ the Supreme Court of Georgia found that an assembly factory in Georgia and a parts-producing plant in Michigan were within the same establishment.¹¹⁵ The court noted that “each depend[ed] on the other for the

¹⁰⁶ See, e.g., *Ahnne v. Dep’t of Labor & Indus. Relations*, 489 P.2d 1397, 1397 (Haw. 1971).

¹⁰⁷ *Construction of Unemployment Statutes*, *supra* note 98, Part III § 8(a).

¹⁰⁸ *Establishment*, DICTIONARY.COM, <http://www.dictionary.com/browse/establishment?s=t> (last visited Nov. 7, 2017).

¹⁰⁹ *Nordling v. Ford Motor Co.*, 42 N.W.2d 576, 588 (Minn. 1950) (emphasis added).

¹¹⁰ 42 N.W.2d 576 (Minn. 1950).

¹¹¹ *Id.* at 588 (emphasis added).

¹¹² *Ahnne v. Dep’t of Labor & Indus. Relations*, 489 P.2d 1397, 1401 (Haw. 1971).

¹¹³ *Gen. Motors Corp. v. Review Bd. of Ind. Emp’t Sec. Div.*, 255 N.E.2d 107, 113 (Ind. App. 1970) (citing *Nordling*, 42 N.W.2d at 586).

¹¹⁴ 62 S.E.2d 209 (Ga. 1950).

¹¹⁵ *Id.* at 212.

functions assigned to it in order to complete the manufacturing processes essential to making Ford automobiles.”¹¹⁶ Because the assembly plant and parts-producing plant were both “inseparable and indispensable” to Ford’s operations, the workplaces were “parts of one and the same ‘factory, establishment, or other premises’ as contemplated [by the disqualification statute].”¹¹⁷

Other jurisdictions have confined the “stoppage of work” inquiry to distinct workplaces by interpreting “establishment” to refer to a specific, physical location.¹¹⁸ Under this test, an employer need only show that a “stoppage of work” occurred at the claimant’s most recent workplace.¹¹⁹ The Supreme Court of Illinois paved the way for this interpretation in *Walgreen Co. v. Murphy*.¹²⁰ The case arose from a labor dispute at a Walgreens warehouse when 320 employees participated in a strike that lasted approximately three weeks.¹²¹ The court concluded that “without question” there was a stoppage of work at that particular Walgreens warehouse;¹²² the case turned on whether the warehouse was an “establishment” under Illinois’s disqualification statute.¹²³ The claimants argued that “the warehouse [was] only one integrated unit of the chain store of the Walgreen Company,”¹²⁴ and because “there [was] no evidence to indicate that the total business of the Company was appreciably affected by the labor dispute at the warehouse,” the Walgreen Company suffered no stoppage of work.¹²⁵ This argument relied on the premise that the term “establishment” could be construed to encompass a corporation’s multi-plant operations.¹²⁶

The Supreme Court of Illinois flatly rejected the claimant’s argument, finding that “[t]he words ‘establishment’ and ‘premises,’ employed in [the disqualification statute] are so commonly understood as units of place that further definition is superfluous.”¹²⁷ The court relied on the plain meaning of the term “establishment” to find that “[c]omplete geographic isolation . . . is sufficient to justify classification of the warehouse as an establishment.”¹²⁸ Because the court

¹¹⁶ *Id.* at 214.

¹¹⁷ *Id.* at 215.

¹¹⁸ *Construction of Unemployment Statutes*, *supra* note 98, Part II § 4(a).

¹¹⁹ *Id.* at Part II § 5.

¹²⁰ 53 N.E.2d 390 (Ill. 1944).

¹²¹ *Id.* at 392.

¹²² *Id.* at 393.

¹²³ *Id.* at 394.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *See generally id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

found that, “without question,” there was a stoppage of work at the Walgreens warehouse, the claimants were disqualified from benefits.¹²⁹

Walgreen adopts what might be called the “distinct physical workplace” approach. Other state courts have used similar language to reach the same conclusion. The Court of Appeals of New York has equated “establishment” with “place or situs.”¹³⁰ The Supreme Court of the State of Hawaii has explained that the term establishment “refer[s] to a building or group of proximate buildings, but, generally speaking, it should not refer to locations many miles apart.”¹³¹ Functionally, these cases stand for the same proposition: that “establishment” refers to a distinct physical workplace, and not a system of a company’s operations.

The “establishment” question is perhaps the biggest legal ambiguity in a “stoppage of work” statute. In some states, an employer must show that a labor dispute caused a stoppage of work among functionally integrated units of work; in other states, only a stoppage of work at a distinct physical workplace is required to disqualify striking claimants. It is an ambiguity that has yielded a wide range of results.

2. West Virginia’s Unemployment Compensation Scheme

The West Virginia Legislature enacted its unemployment compensation scheme, along with a labor dispute disqualification, in 1936.¹³² The Legislature borrowed heavily from the Social Security Draft Bill, opting to adopt the “stoppage of work” approach. This Section will detail West Virginia’s experience with the “stoppage of work” statute before addressing the amendment made in April of 2017.

i. The “Stoppage of Work” Statute

For 81 years, West Virginia was a “stoppage of work” state.¹³³ The establishment issue discussed in the previous section never made it before the Supreme Court of Appeals of West Virginia. The court did have several occasions to address the old statute, however.¹³⁴ The court in *Cumberland &*

¹²⁹ *Id.*

¹³⁰ *In re Claim of Ferrara*, 176 N.E.2d 43, 46 (N.Y. 1961).

¹³¹ *Ahnne v. Dep’t of Labor & Indus. Relations*, 489 P.2d 1397, 1401 (Haw. 1971).

¹³² *See Miners in Gen. Grp. v. Hix*, 123 W. Va. 637, 637 (1939).

¹³³ *See S.B. 222*, 83d Leg., Reg. Sess. (W. Va. 2017).

¹³⁴ *Verizon Servs. Corp. v. Bd. of Review of Workforce* W. Va., No. 12-1106, 2013 WL 5967047, at *1 (W. Va. Nov. 8, 2013) (memorandum opinion affirming the factual determinations of the ALJ); *Smittle v. Gatson*, 465 S.E.2d 873, 877 (W. Va. 1995) (exempting claimants from disqualification because the employer initiated a shutdown); *Ash v. Rutledge*, 348 S.E.2d 442, 446–47 (W. Va. 1986) (allowing claimants to collect benefits because they did not participate in

*Allegheny Gas Co. v. Hatcher*¹³⁵ articulated the general standard for determining the existence of a stoppage of work.¹³⁶

The *Cumberland* case arose out of a labor dispute between a gas company and a local union.¹³⁷ Negotiations between the two for a new collective bargaining agreement slowed to a standstill in the mid-summer months of 1960.¹³⁸ Fearing a strike during the winter months, when the company's heating services would be needed the most, the company imposed a lockout on July 29, 1960.¹³⁹ During the lockout, the company requested 17 workers to "perform emergency work," an offer the union and the individual claimants declined.¹⁴⁰ All 79 of the company's hourly workers ceased to work, picketing peacefully until the dispute was resolved on August 26, 1960.¹⁴¹ The majority opinion in *Cumberland* explained the company's operations during the lockout:

No new employees were hired by the gas company to perform [any] of their duties, but emergency or essential duties normally performed by the claimants were performed by seventeen supervisory and promotional employees of the company. According to the testimony of the gas company's district office manager . . . the company's overall operations were curtailed by approximately eighty per cent and work in thirteen necessary and essential categories of the gas company's business and operations either ceased entirely or was performed on an emergency and partial basis.¹⁴²

The claimant's collection hinged on whether a "stoppage of work" occurred at the "factory, establishment or other premises" at which the claimant

the labor dispute); *Lee-Norse Co. v. Rutledge*, 291 S.E.2d 477, 482–83 (W. Va. 1982) (finding that the expiration of a collective bargaining contract does not qualify as a "dispute" under the statute); *Hill v. Bd. of Review*, 276 S.E.2d 805, 811–12 (W. Va. 1981) (finding that a work stoppage that occurs because of an independent event unrelated to the labor dispute would not disqualify a claimant); *Copen v. Hix*, 43 S.E.2d 382, 387 (W. Va. 1947) (disqualifying claimants who financed the dispute).

¹³⁵ 130 S.E.2d 115 (W. Va. 1963).

¹³⁶ *Id.* at 118.

¹³⁶ *Id.* at 119–20.

¹³⁷ *Id.* at 118.

¹³⁸ *Id.* It is worth noting that the expiration of a collective bargaining agreement can no longer be the basis for a "labor dispute." *Lee Norse*, 291 S.E.2d at 484 (overruling *Cumberland*, 130 S.E.2d 115, on these grounds).

¹³⁹ *Cumberland*, 130 S.E.2d at 118.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 118–19.

last worked.¹⁴³ The Department of Employment Security Board of Review and the Circuit Court of Kanawha County both found that there had not been a stoppage of work.¹⁴⁴ Accordingly, section 21A-6-3 of the West Virginia Code did not disqualify the claimants from collection.¹⁴⁵ The Supreme Court of Appeals of West Virginia agreed,¹⁴⁶ and in doing so, articulated the approach that lower courts in West Virginia followed until the recent amendment to the statute.¹⁴⁷

The court held that “stoppage of work . . . refer[s] to the employer’s plant operations rather than to the employees’ labor.”¹⁴⁸ A stoppage of work “cannot be determined solely on the basis of the proportionate number of employees affected.”¹⁴⁹ A stoppage of work *could* stem from a strike “affecting relatively few employees”;¹⁵⁰ on the other hand, a labor dispute involving “a proportionately greater number of employees” does not necessarily imply a stoppage.¹⁵¹ Instead, triers of fact will hear evidence regarding the employer’s production, revenue, and overall business operations to determine the stoppage of work issue.¹⁵² States with statutes similar to West Virginia’s disqualification statute also hold this principle.¹⁵³

The specific test adopted by the court required a “substantial curtailment of work or operations” for the section 21A-6-3(3) disqualification to apply.¹⁵⁴ Applied to the facts in *Cumberland*, the Supreme Court of Appeals of West Virginia concluded that there was no stoppage of work because “there was no substantial showing of unfulfilled [gas] demands,” and there was no “showing of an accumulated backlog of work . . . to require employment of additional personnel or to require overtime.”¹⁵⁵ Because the court found no stoppage of work, section 21A-6-3(3) did not disqualify claimants from collecting unemployment benefits.¹⁵⁶

After the *Cumberland* decision in 1963, there was hardly any development of the “stoppage of work” issue in West Virginia. While other

¹⁴³ *Id.* at 119.

¹⁴⁴ *Id.* at 115.

¹⁴⁵ *Id.* at 117.

¹⁴⁶ *Id.* at 123.

¹⁴⁷ *Id.* at 120–23.

¹⁴⁸ *Id.* at 120.

¹⁴⁹ *Id.* at 121.

¹⁵⁰ *Id.* (emphasis added).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ 76 AM. JUR. 2d *Unemployment Compensation* § 181.

¹⁵⁴ *Cumberland*, 130 S.E.2d at 121.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 123.

courts have found occasion to interpret state disqualification statutes and develop judicial rules,¹⁵⁷ the Supreme Court of Appeals of West Virginia deferred greatly to the administrative adjudication process,¹⁵⁸ evidenced by the fact that West Virginia courts will only reverse Board of Review factual findings that are “clearly wrong.”¹⁵⁹ Although questions of law warrant *de novo* review,¹⁶⁰ West Virginia courts have not embraced many legal questions arising from the disqualification statute. The “stoppage of work” issue “requires complex factual determinations . . . made without any statutory guidelines” and often results in allegedly “arbitrary decisions.”¹⁶¹

A reliance on standard-less administrative fact finding might be best evidenced in the Supreme Court of Appeals’s memorandum opinion in *Verizon Services Corp. v. Board of Review of Workforce West Virginia*.¹⁶² In *Verizon*, the court used the “substantial deference” standard to affirm an administrative finding that the claimants were not disqualified.¹⁶³ The claimants worked at a call center that handled customer service matters.¹⁶⁴ During the strike, the call center diverted customer service calls to a different location and used the retained employees to handle sales calls, which required fewer man-hours.¹⁶⁵ The call center saw a significant drop in services provided during the strike, but the Board of Review permitted benefits because Verizon’s customer service hotline remained on-line, thanks to the other call centers that picked up the slack.¹⁶⁶ Because the stoppage of work question is presented as entirely a question of fact, the court relied heavily upon the Board’s findings—which Justice Allen H. Loughry II called “patently unfair” in his dissent.¹⁶⁷

ii. *West Virginia’s New Statute*

Perhaps noting the shortcomings of the “stoppage of work” inquiry, the West Virginia Legislature passed an amendment to the labor dispute

¹⁵⁷ See *supra* Part II.

¹⁵⁸ Syl. Pt. 3, *Adkins v. Gatson*, 453 S.E.2d 395, 397 (1994).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (“If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo*.”).

¹⁶¹ Ken Matheny, *Labor Dispute Disqualification for Unemployment Compensation Benefits*, 95 W. VA. L. REV. 791, 797 (1993).

¹⁶² *Verizon Servs. Corp. v. Bd. of Review of Workforce W. Va.*, No. 12-1106, 2013 WL 5967047, at *3–5 (W. Va. Nov. 8, 2013).

¹⁶³ *Id.* at *3.

¹⁶⁴ *Id.* at *1.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at *6 (Loughry, J., dissenting).

disqualification statute in April of 2017.¹⁶⁸ The statute disqualifies any claimant “[f]or any week or portion thereof in which he or she did not work as a result of . . . [a] strike or other bona fide labor dispute which caused him or her to leave or lose his or her employment.”¹⁶⁹ The new test is unique. The statute also contains two “employer fault” provisions that deserve some attention.

a. The “Lockout” Provision

The new statute makes a distinction between unemployment stemming from a strike and unemployment stemming from a lockout. While employees on strike are disqualified, locked out employees are not—so long as the claimant can show that he or she showed up for work and was turned away by the employer.¹⁷⁰ Interestingly, the statute as originally proposed required a locked out employee to “identif[y] that he or she was reporting for and prepared to work.”¹⁷¹ This language was stricken in the House.¹⁷²

b. The “Permanent Replacement” Provision

Striking claimants are entitled to benefits “[i]f the operation of the facility is with workers hired to permanently replace the employees on strike.”¹⁷³ However, employers may utilize the services of “non-striking employees of the company” or “contractors” to maintain operations without entitling striking employees to benefits.¹⁷⁴ Accordingly, the question of disqualification lies on whether the “scab” used to keep the facility running is temporary or permanent. A striking claimant is deemed permanently replaced if the new employee is notified they are a permanent replacement.¹⁷⁵ The statute suggests that temporary replacements work “for the duration of [the] . . . labor dispute, or a shorter period.”¹⁷⁶

III. ANALYSIS

Having surveyed the national landscape and detailed West Virginia statutory development, this Note will turn to its main argument. This Part will

¹⁶⁸ W. VA. CODE ANN. § 21A-6-3 (West 2017).

¹⁶⁹ *Id.* § 21A-6-3(4).

¹⁷⁰ *Id.* § 21A-6-3(4)(b)–(c).

¹⁷¹ See S.B. 222, 83d Leg., Reg. Sess. (W. Va. 2017).

¹⁷² W. VA. CODE ANN. § 21A-6-3 (West 2017).

¹⁷³ *Id.* § 21A-6-3(4)(b).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* § 21A-6-3(4)(d).

¹⁷⁶ *Id.*

show that the “stoppage of work” inquiry is unwieldy and difficult to apply. It will then explain why West Virginia’s amendment is an admirable replacement that creates a more easily justiciable standard, while preserving the important aspects of the “stoppage of work” test that protected claimants. This Part will conclude by pointing to a few problematic aspects of the new statute, and by explaining how aggrieved claimants might argue around these statutory roadblocks before a circuit court or the Supreme Court of Appeals of West Virginia.

A. West Virginia Is Better Off Without the “Stoppage of Work” Test

The “stoppage of work” test has theoretical and practical shortcomings. On a theoretical level, the “stoppage of work” test is a poor metric of identifying the existence of a labor dispute. In 1940, the Federal Social Security Administration claimed the “stoppage of work” test provided “objective standards” to use in determining the length of a labor dispute.¹⁷⁷ *Verizon Services v. Board of Review*¹⁷⁸ provides an excellent case study as to why an employer’s operations are a poor indicator of the seriousness of a labor dispute.

In *Verizon*, the effected call center shifted its operational focus during a labor dispute.¹⁷⁹ Before the strike, the center handled phone calls from customers seeking to cancel a subscription.¹⁸⁰ But after 70 employees went on strike in 2013, the center began operating as a sales and service center.¹⁸¹ When Verizon challenged the claim, the Board had to determine whether the call center suffered a “substantial curtailment of operations”¹⁸²—an impossible task, considering operations were of a different character before and during the strike.

Justice Loughry’s dissent in *Verizon* highlights several shortcomings of the “stoppage of work” inquiry in practice.¹⁸³ The “stoppage of work” question placed the burden on the employer to collect operational data during the labor dispute and to furnish that proof to the Board.¹⁸⁴ The Board was then free to discredit that operational data if the employer deviated from its data collection protocol during the labor dispute.¹⁸⁵ Justice Loughry called it “patently unfair” to expect employers to maintain data collection protocol during a dispute where

¹⁷⁷ Lewis, *supra* note 77, at 80 (citing U.S. DEP’T OF LABOR, BUREAU OF EMP’T SEC., MANUAL OF STATE EMPLOYMENT SECURITY LEGISLATION 505 (1940)).

¹⁷⁸ 2013 WL 5967047 (W. Va. Nov. 8, 2013).

¹⁷⁹ *Id.* at *1.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at *2–4.

¹⁸³ *Id.* at *5 (Loughry, J., dissenting).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at *6.

much of their labor force was depleted.¹⁸⁶ After all, the employees typically tasked with tracking operational data may well be unavailable.

A state-by-state comparison of “stoppage of work” statutes shows that the test fails to produce predictable results. Courts have split on the scope on the inquiry, leading to wildly different results stemming from nearly identical language deriving from the same draft bill. Finally, the Board resolves these compensation claims without any meaningful review from courts. The Supreme Court of Appeals of West Virginia will reverse a factual determination only in cases of “substantial deference.”¹⁸⁷ The result is an Unemployment Board (1) with very few legal principles constraining its “stoppage of work” inquiry which (2) is afforded a high level of deference.

The “stoppage of work” test is not well-calibrated to determine the seriousness of a labor dispute. Nor is the language easily interpreted or consistently applied. The state is better off without it.

B. West Virginia’s New Statute Is an Admirable, if Imperfect, Replacement

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The new West Virginia statute removes the “stoppage of work” test entirely. The amendment adds much needed clarity and predictability to a contentious area of law. Undoubtedly, the amendment will result in more claimant disqualifications, but the “employer fault” provisions keep much-needed protections for claimants who are locked out and/or permanently replaced by their employer. The state judiciary’s treatment of these “employer fault” provisions may well determine the success of the new amendment.

This Section will show why the new test will lead to clear and predictable results. Next, it will explain three shortcomings of the statute and how claimants who find themselves aggrieved by these obstacles can overcome them.

1. The New Statute Provides Much-Needed Clarity and Predictability

The new West Virginia statute is far easier to apply, and far more predictable, than “stoppage of work” statutes. The Unemployment Services Office judges need not review company operations to determine whether curtailment of operations was “substantial” enough to rise to the level of a stoppage. Instead, the judge must first determine whether a “strike or other bona fide labor dispute . . . caused [the claimant] to leave or lose his or her employment”;¹⁸⁸ second, whether the employer locked out or permanently replaced the claimant.¹⁸⁹

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at *3 (majority opinion).

¹⁸⁸ W. VA. CODE ANN. § 21A-6-3(4)(a) (West 2017).

¹⁸⁹ *Id.* § 21A-6-3(4)(b)–(d).

A clear and predictable answer follows. Predictability is of critical importance for both employers and potential claimants: employers hope to control their insurance rates, and a claimant's health and welfare might depend on the question of disqualification. The stoppage of work question fails to yield predictable results; this amendment gives clarity to both employers and employees.

Undoubtedly, removing the "stoppage of work" test will lead to more disqualifications. The claimants in *Verizon Services*, for instance, would not be able to collect under the new statute. But the statute does contain two "employer fault" provisions protecting claimants: locked out or permanently replaced claimants remain eligible for benefits. Those two "employer fault" provisions give important protections to claimants—and these protections are well-defined to give clear instructions to the Unemployment Services Office. However, clarity comes at a price.

2. Three Shortcomings of the Current Statute

With such a bright-line disqualification test, the exceptions take on new importance. In the labor dispute disqualification context, "escape clauses" and "employer fault" provisions are the clearest paths for some claimants to avoid disqualification. The new statute has two "employer fault" provisions which could be circumvented by clever employers. The amendment also removed an "escape clause"—a development which could prejudice some claimants. This Section will explain these obstacles and offer an argument for claimants aggrieved by any of these shortcomings.

i. The "Lockout" Provision Could Be Easily Circumvented by Clever Employers

The first "employer fault" provision protects claimants who are unemployed because of a lockout. A claimant is "locked out" (and, therefore, not disqualified from collecting) when (1) the claimant "present[s] himself or herself physically for work at the workplace," and (2) "the employer denie[s] the individual the opportunity to . . . work."¹⁹⁰

An employer could easily use these conditions to its advantage—maliciously, or even by chance. Imagine an employer sending an email notifying employees of a lockout. These employees, knowing they will be turned away if they commute to work, do not "present [themselves] physically for work at the workplace" the next day.¹⁹¹ Perhaps the employees demonstrate outside the employer's facility, but the employer never outright "denie[s] the [employees]

¹⁹⁰ *Id.* § 21A-6-3(4)(c).

¹⁹¹ *Id.*

the opportunity to . . . work” at the site.¹⁹² Those hypotheticals do not fit the narrow terms of the “employer fault” provision; by a strict reading of the statute, those claimants are disqualified.

ii. *“Permanently Replaced” Claimants Have a Difficult Evidentiary Burden*

The second “employer fault” provision protects claimants who are permanently replaced during a strike. The “permanently replaced” provision is similarly rigid. It reads as follows:

[A]n individual is determined to be permanently replaced where the individual employee establishes that . . . the position of the employee has been occupied by another employee who has been notified they are permanently replacing the employee who previously occupied the position. Employees or contractors who are hired to perform striking employees’ work on a temporary basis, such as the duration of a strike or other bona fide labor dispute, or shorter period of time, may not be determined to have permanently replaced a striking employee.¹⁹³

The Author could not find any parallel language in other disqualification statutes. The language places the burden of proof on the claimant to show that the employer “notified [the new employee] they are permanently replacing the [claimant].”¹⁹⁴ Therefore, a claimant must present evidence of a communication between an employer and an employee. By necessity, this communication occurs while the claimant is out of work due to a labor dispute. Strictly read, this test might be a significant burden on the claimant.

iii. *Claimants Uninvolved in the Labor Dispute Are Still Disqualified*

The old “stoppage of work” statute contained an escape clause that excused claimants who were “not participating in, or financing, or directly interested in the labor dispute which caused the stoppage of work.”¹⁹⁵ The new statute offers no such protection. A strict application of our current statute would flatly disqualify any claimant who lost or left his or her employment because of a labor dispute, regardless of the claimant’s participation. This raises a significant fairness concern. However, as we will see in the next Section, the judiciary might not apply the statute so strictly.

¹⁹² *Id.*

¹⁹³ *Id.* § 21A-6-3(4)(d).

¹⁹⁴ *Id.*

¹⁹⁵ W. VA. CODE ANN. § 21A-6-3(4) (West 2016) (amended 2017).

3. Using *Lee-Norse Co. v. Rutledge*.¹⁹⁶ A Claimant's Argument

The Supreme Court of Appeals of West Virginia's reasoning in *Lee-Norse Co. v. Rutledge*¹⁹⁷ suggests the court might not allow employers such an easy run-around of the spirit of the statute.¹⁹⁸ In that case, the employer instituted a pre-emptive lockout before a collective bargaining agreement expired.¹⁹⁹ The court concluded that the statute "was not intended to disqualify workers who were locked out during contract negotiations if they were willing to work on a day-to-day basis."²⁰⁰ A unanimous court relied heavily on the aforementioned principles of labor dispute disqualification: "unemployment compensation statutes . . . [are] liberally construed towards their humanitarian aims,"²⁰¹ and compensation should be afforded to those who are involuntarily unemployed.²⁰²

Claimants should cite the "legislative policy" and "involuntary unemployment" principles if an employer attempts to run around these "employer fault" provisions. *Lee-Norse* indicates the Supreme Court of Appeals of West Virginia may be receptive to such an argument.

IV. CONCLUSION

The "stoppage of work" inquiry has long dominated the labor dispute disqualification conversation across the country. The area is ripe for litigation. Courts are divided on an issue of statutory construction that dramatically affects the availability of benefits. Meanwhile, the ultimate factual determination—whether an employer suffered a substantial curtailment of operations—requires heavy discovery, and is left to a finder of fact at the administrative level.

The West Virginia Legislature correctly questioned whether a "stoppage of work" inquiry is a workable test—or even an intuitive one. By replacing it, employers and claimants alike will see more predictable results. West Virginia's new statute is certainly a step in the right direction.

The Supreme Court of Appeals of West Virginia will likely have reason to interpret the new statute in the near future. In light of the black and white test drawn by the legislature, it is possible the court uses *Lee Norse* and the

¹⁹⁶ 291 S.E.2d 477 (W. Va. 1982).

¹⁹⁷ *Id.* at 481–84. Of course, this case predates our current iteration of the statute, but the principles utilized by the court would likely translate to the current statute.

¹⁹⁸ Nothing in this case suggests the employer acted in bad faith or attempted to run around the statute. However, the principles announced by the court might be useful to a claimant who finds him or herself in that situation.

¹⁹⁹ *Lee Norse Co.*, 291 S.E.2d at 478.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 482.

²⁰² *Id.*

humanitarian aims of unemployment compensation to afford claimants some relief in the form of expanding the applicability of the statute's exceptions.

Other "stoppage of work" states should consider an amendment like West Virginia's. "Stoppage of work" states have for decades remained with the statute encouraged by the Social Security Administration in 1940. Perhaps the issue is ripe for reconsideration in legislatures across the country.

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* J.D., West Virginia University College of Law, 2017. I would like to thank the members of the *West Virginia Law Review* for their hard work throughout the publication process. Without their patience, this Note would just be an idea. I would also like to thank every professor, supervisor, and colleague that has taken the time to edit and critique my work. Without their insight, my writing would be incoherent. Finally, I am forever grateful for the unconditional love of my friends and family. Without their support . . . well, I don't care to speculate.

